

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|----------------------------------|---|----------------------|
| JOHN L. SWARTZ |) | |
| Claimant |) | |
| VS. |) | |
| |) | |
| STATE OF KANSAS |) | Docket No. 1,018,871 |
| Respondent |) | |
| AND |) | |
| |) | |
| STATE SELF-INSURANCE FUND |) | |
| Insurance Carrier |) | |

ORDER

Respondent appeals the December 5, 2005 Award of Administrative Law Judge Kenneth J. Hursh. Claimant was awarded a permanent partial general disability of 60.5 percent stemming from injuries suffered on August 20, 2003. The Appeals Board (Board) heard oral argument on April 26, 2006.

APPEARANCES

Claimant appeared by his attorney, Patrick C. Smith of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, William L. Phalen of Pittsburg, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

1. What is the nature and extent of claimant's injuries and disabilities? More particularly, what functional impairment has claimant suffered

as a result of claimant's work injuries? Additionally, has claimant suffered a permanent partial general disability in excess of claimant's percentage of functional impairment?

2. Is respondent entitled to an offset for retirement benefits received by claimant pursuant to K.S.A. 44-501(h)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record contained herein, the Board finds the Award of the Administrative Law Judge (ALJ) should be modified to award claimant a 15 percent permanent partial whole body disability award on a functional basis for injuries suffered while employed with respondent, but any additional disability award should be denied.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. Except as set forth herein, the Board adopts those findings and conclusions as its own.

Claimant, a police officer for Pittsburg State University (PSU), was injured while backing up a Pittsburg Police Department officer on August 20, 2003. The parties acknowledge that a part of claimant's duties required he act as a back-up officer for the city police. On the date of accident, claimant, while assisting city police in the pursuit of a suspect, stepped into a hole, falling into a basement window. As a result, claimant suffered injuries to his right shoulder, low back and left hip.

Claimant initially sought treatment with Tim Voss, D.C. After a series of adjustments proved less than beneficial, claimant was referred to orthopedic surgeon Robert F. Stringer, D.O. Dr. Stringer diagnosed claimant with a torn rotator cuff tendon in his right shoulder. This was confirmed by MRI. On October 10, 2003, Dr. Stringer performed an open rotator cuff tendon repair to the right shoulder. He examined claimant eight times, post operatively, with the last exam occurring on February 11, 2004. At that time, Dr. Stringer found claimant to be at maximum medical improvement and assessed claimant a 5 percent permanent partial functional impairment for the injuries suffered on the date of accident with respondent. This rating was pursuant to the fourth edition of the *AMA Guides*.¹ Dr. Stringer also opined that claimant had suffered no task loss as a result of the shoulder injury and subsequent surgery. Dr. Stringer expressed no opinion regarding the injuries to claimant's low back and hip.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

While claimant was being treated by Dr. Stringer, he was also being treated for low back and hip problems with board certified physical medicine and rehabilitation specialist Kevin D. Komes, M.D. Dr. Komes first saw claimant on December 16, 2003, for the August 2003 injury. Dr. Komes had earlier treated claimant for low back problems stemming from an injury suffered by claimant in January of 2003. It is noted that claimant has had a long history of back problems, having undergone a fusion at L5-S1 in 1980. Claimant returned to full duty after that surgery without restrictions and without an impairment rating.

Dr. Komes noted claimant's pain complaints after the August 2003 injury were in the same area of the back as before the injury. In December 2003, Dr. Komes diagnosed claimant with pelvic dysfunction or sacral dysfunction. Claimant was referred to physical therapy.

Claimant also saw Dr. Hish Majzoub, a neurosurgeon in Joplin, Missouri. This referral, by the State Self-Insurance Fund, resulted in claimant receiving two injections in his low back. These injections, which were performed by Dr. Mark Pinkerton, provided only temporary relief.

By August 31, 2004, Dr. Komes determined that claimant had reached maximum medical improvement. He assessed claimant a 5 percent permanent partial impairment to the body pursuant to the fourth edition of *AMA Guides*.² This impairment was due to claimant's subjective complaints. He found no significant pathology resulting from claimant's August 20, 2003 injury. His final diagnosis was a history of back pain due to work-related injury, with a history of prior fusion.

Dr. Komes restricted claimant from lifting over 25 pounds frequently and allowed lifting up to 50 pounds occasionally. Claimant was allowed to walk 20 to 30 minutes continuously and sit 30 to 40 minutes out of an hour. The walking restrictions were the result of a non-work-related knee injury. However, he said the lifting restrictions and the sitting restrictions were the result of claimant's prior fusion. None of the restrictions were assessed from claimant's August 2003 work-related injury.

Dr. Komes was provided a work task assessment created by vocational expert Jerry Hardin. Dr. Komes opined that claimant had suffered no task performing loss as a result of the August 2003 work injury. Dr. Komes acknowledged that he had placed no restrictions on claimant before the August 2003 injury. But testified he would have placed the same restrictions on claimant as the result of the prior fusion.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., on November 1, 2004. Dr. Prostic diagnosed claimant with right

² *AMA Guides* (4th ed.).

rotator cuff tear, surgically repaired, and a grade I spondylolisthesis at L5-S1, post laminectomy and with an attempted arthrodesis at that level. Dr. Prostic found the arthrodesis to not be solid. He assessed claimant a 10 percent impairment to the right upper extremity as a result of the rotator cuff tear and a 10 percent rating to the body for the low back. The ratings were combined for a 15 percent permanent partial impairment to the whole body and were pursuant to the fourth edition of the *AMA Guides*.³ Dr. Prostic adopted the restrictions of Dr. Komes, but acknowledged he was not sure whether claimant's range of motion loss in the low back was due to claimant's work-related injury or the prior fusion.⁴

Dr. Prostic reviewed the task list prepared by Mr. Hardin, opining that claimant had lost the ability to perform 54 percent of claimant's prior work tasks, when taking into consideration only non-duplicative tasks. Although he testified that claimant's task loss was from claimant's work-related injury and the restrictions.⁵ Dr. Prostic did not differentiate between which tasks were lost due to the injury and which were from the prior fusion.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.⁶

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.⁷

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association

³ *AMA Guides* (4th ed.).

⁴ Prostic depo. at 13-14.

⁵ Prostic depo. at 9.

⁶ K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

⁷ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁸

The ALJ found claimant to have suffered an 8 percent permanent partial impairment to the body as a result of the injuries suffered while employed with respondent. After considering the opinions of Dr. Komes, Dr. Stringer and Dr. Prostic, the Board finds that the opinion of Dr. Prostic is most persuasive. The Board, therefore, modifies the Award to grant claimant a 15 percent permanent partial general disability based upon his functional impairment.

Claimant was awarded a 60.5 percent permanent partial disability for the injuries suffered on August 20, 2003, while employed with respondent. However, the restrictions placed on claimant by both Dr. Komes and Dr. Prostic are, according to Dr. Komes, related to claimant's prior fusion. Dr. Prostic, when asked to give an opinion regarding claimant's task loss, testified that the loss was related to the work-related injury and the restrictions, which Dr. Komes had testified were related to the prior fusion and not the work injury. Dr. Prostic did not testify that claimant's restrictions were new or changed as a result of the August 20, 2003 injury. Accordingly, the evidence fails to establish that claimant had any restrictions or lost any ability to work as a result of that injury.⁹ It is claimant's burden to prove his entitlement to benefits as they relate to this work-related injury. Here, the Board finds claimant has failed to do so. Claimant is, therefore, limited to his functional impairment.

Respondent claims entitlement to an offset pursuant to K.S.A. 44-501(h). Claimant and Renee Forque, respondent's employee assigned to assist employees with KPERS benefits, testified claimant is receiving \$1,523.63 per month in benefits.¹⁰ The statute in question states:

(h) If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee,

⁸ K.S.A. 44-510e(a).

⁹ *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 998 P.2d 514 (2000).

¹⁰ Renee Forque testified that claimant is receiving \$1,523.63. But claimant testified that he is receiving right at \$1,500. (See R.H. Trans. at 42.)

but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.¹¹

Here, as claimant is limited to his functional impairment, no offset would be proper.

Furthermore, work-related disability benefits that are not dependent on age and/or years of service are not retirement benefits for the purposes of K.S.A. 44-501(h).¹²

Here, as both claimant and Ms. Forque described the benefits as “disability benefits”, even if permanent partial disability benefits in excess of claimant’s functional impairment were awarded, there would be no offset.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 5, 2005, should be, and is hereby, modified to award claimant a 15 percent permanent partial disability on a functional basis for the injuries suffered on August 20, 2003, and based upon an average weekly wage of \$842.30, but reverses the Administrative Law Judge with regard to claimant’s entitlement to any additional benefits for a “work disability.” The remainder of the Award is affirmed so long as it does not contradict the findings and conclusions contained herein.

Claimant is entitled to 48.58 weeks of temporary total disability compensation at the rate of \$440.00 per week or \$21,375.21, followed by 57.21 weeks permanent partial disability compensation at the rate of \$440.00 per week or \$25,172.40 for a 15 percent permanent partial disability, making a total award of \$46,547.61, all of which is due and owing and ordered paid in one lump sum minus any amounts previously paid.

IT IS SO ORDERED.

¹¹ K.S.A. 44-501(h).

¹² *Green v. City of Wichita*, 26 Kan. App. 2d 53, 977 P.2d 283 (1999).

Dated this ____ day of June, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
William L. Phalen, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director